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In the Supreme Court of the United States

OCTOBER TERM, 1957

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA,
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 3) is reported at 157 F. Supp. 934.

JURISDICTION

The judgment of the Court of Claims was entered on January 15, 1958 (R. 35). A timely petition for rehearing was denied on March 5, 1958 (R. 45). The petition for a writ of certiorari was filed on May 31,

1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below correctly concluded that the Government has made just compensation for all property it has taken from petitioner gas company and that the further compensation sought by petitioner constitutes an effort to recover for a noncompensable loss of business.

STATEMENT

The United States has constructed a dam at Whittier, California, to intercept and temporarily impound flood waters of the Rio Hondo and San Gabriel Rivers where they converge. The height of the dam is 239 feet above sea level or 55 feet above the Rio Hondo Channel. The dam and the area devoted to reservoir purposes are designed to hold water up to a contour elevation of 229 feet, thus insuring against the dangers of flood (Findings 2-7).

By condemnation or purchase, the United States acquired flowage easements over, or the fee simple title to, approximately 2,912 acres of land (including improvements thereon) for the dam site and reservoir (Findings 8-9). The complaint, declarations of taking and amendments filed in the condemnation case recited (Findings 8, 12) that the United States acquired the tracts described subject

> to existing easements for public roads and highways, public utilities, railroads and pipe lines; and to existing easements for flood control purposes of the Los Angeles County Flood Control District.

Petitioner owned and operated a network of underground transmission lines, service pipes and distribution facilities in the condemned area. These facilities, which had been used for supplying gas to some 394 customers in that area, had been installed on private property and in the public streets and alleys pursuant to rights of way and deeded easements granted to petitioner (Findings 10-11). The United States has prohibited human habitation in the area taken and has removed all the structures except certain industrial structures which have been buttressed against the maximum possible water elevation (Finding 9).

The United States did not condemn, purchase, or otherwise acquire any part of petitioner's facilities, rights-of-way, easements or franchise rights, except for certain facilities which were located in and under the dam site and its appurtenant embankments, diversion channels, spillways and outlet works. For these latter facilities, the United States contracted to pay or has paid the reasonable value (Finding 13). Also, the United States contracted with petitioner for the relocation, alteration, removal or abandonment of certain operating facilities located within a portion (segment G) of the Project, and for the transfer and granting to the Government of all petitioner's right, title and interest in that area (Finding 14).

After the United States acquired the various buildings in the reservoir area, petitioner was informed that its services were no longer required and it was requested to disconnect and remove its meters and facilities from those buildings. Petitioner complied with those requests and abandoned its facilities in place because the cost of removal would have exceeded their salvage value (Finding 17).

Petitioner brought this action to recover $188,812.60 as just compensation for the property rights and facilities in the reservoir area which the United States did not acquire by condemnation or otherwise and for which petitioner has not been paid. The Government denied liability. The issue was presented upon an agreed statement of facts. The Court of Claims held that the United States is not liable, on the ground that it did not take the property in question, but merely deprived petitioner of customers, thus causing a noncompensable business loss. A different question would be presented, the court held, if petitioner's system in the project area were one adapted for serving customers outside that area.

ARGUMENT

Petitioner seeks review on the ground that the Court of Claims "overlooked" certain facts (Pet. 5). But the court below had before it, and took account of, all the facts which petitioner discusses. Essentially the contention is that the court below should have made different findings.

Petitioner asserts, as an "overlooked" fact, that the facilities located within the area taken "served areas outside" of that area (Pet. 5). The Court of Claims found otherwise (Pet. App. 7). It expressly relied upon the agreed statement of facts. That statement was stipulated to constitute "a full and correct statement of the facts relevant and pertinent to the * * * claim" and reserved the right "to the production of such other and further evidence as shall be necessary or proper for the determination of the issue of liability herein" (Par. 21). Petitioner produced no further evidence. Moreover, it was argued by Government

counsel in the court below that there were no persons outside the area served by these facilities but, that even if there were, petitioner could continue to serve them.[1] Thus this fact was not "overlooked" but presented for determination. The franchises and maps (Exhibit C and F) relied upon here (Pet. 4) were before the court as parts of the agreed statement of facts (Pars. 12 and 20). Schedule III to the petition, also relied upon here (Pet. 4), was before the court merely as a schedule of the compensation sought and was referred to in the agreed statement as "plaintiff's claim herein" (Par. 20). It is self-serving and was denied in the Government's answer (Par. 6).

Petitioner further asserts, as an "overlooked" fact, that it is "making no claim for loss of business through loss of customers or otherwise," but in the same sentence it states, as a third "overlooked" fact, that "petitioner's loss of the value of the physical facilities in place was caused directly by the Government's instruction that they be disconnected and their being blocked off in compliance with such instruction" (Pet. 5). The "loss of value" described in the latter statement can only derive from "loss of customers."

When the Government acquired the buildings which petitioner served, it merely instructed petitioner to disconnect the meters and block off the pipes because it did not want the service. Any or all of the prior consumers could have done the same without incurring liability to petitioner. The Government did not take petitioner's pipes or easements. As the Court of Claims

[1] The Government's brief stated (p. 18): "The plaintiff's pipes which it installed along or under these easements are still in place. The occasional infrequent future flooding of the area has not resulted and cannot result in any appreciable damage to the plaintiff insofar as those easements are concerned."

said (Pet. App. 7): "We do not reach value unless the pipes have been taken, which we think is not the case." Petitioner was at liberty to leave the pipes in place or to remove them. The Court of Claims obviously agreed, as it was entitled to do, with the determination by the Army Corps of Engineers, set out in the agreed statement (Par. 16), that the facilities involved here were not taken because they "do not interfere with the project and are not required for continuance of service."[2] It is plain, therefore, that petitioner's loss stems solely from loss of customers.

Loss of customers is a business loss. As this Court has repeatedly held, the Government must pay only for what it takes and not for opportunities which the owner may lose. *United States* v. *Powelson,* 319 U.S. 266, 282; *Mullen Benevolent Corp.* v. *United States,* 290 U.S. 89; *Mitchell* v. *United States,* 267 U.S. 341; *Joslin Manufacturing Co.* v. *Providence,* 262 U.S. 668; *Omnia Commercial Co., Inc.* v. *United States,* 261 U.S. 502.

The principle has been uniformly applied to utility company business losses of the very kind involved here. Thus, in *Kellettville Gas Co.* v. *United States,* 56 F. Supp. 919 (W.D. Pa.), the Government acquired all property except the Gas Company's mains and easements within an area to be flooded by a dam. The court said (p. 922):

> The loss of The Kellettville Gas Company was a loss of customers which is a business loss. If a merchant in Kellettville, with an established good

[2] The Government purchased and paid petitioner "the reasonable value" ($53,424.92) for all facilities which had to be rearranged or relocated or which could not be removed (Agreed Statement, pars. 14-15; Findings, pars. 13-14).

> will and business, lost all his customers from the same cause, he would not be entitled to recover from the United States the amount of his business loss. The same would be true of the loss sustained by a physician or a lawyer with an established clientele. If a private individual acquired the same property in Kellettville as the United States did and razed the buildings thereon, he would not be required to compensate the company for its loss. The United States is in the same position.

To the same effect are *Fix* v. *City of Tacoma*, 171 Wash. 196, 17 P.2d 599, and *Deepe* v. *United States*, 103 Colo. 294, 86 P.2d 242, involving, respectively, a water company and a telephone company.[3] Cf. *Public Water Supply District No. 3* v. *United States*, 133 C. Cls. 348, 135 F. Supp. 887.

Contrary to petitioner's suggestion (Pet. 6), the decision below does not conflict with *International Paper Co.* v. *United States*, 282 U.S. 399. In that case, "the Government took the property that the petitioner owned" (p. 408). That distinction, as well as numerous others, applies to the other cases upon which petitioner relies (Pet. 9, 10, 13, 14): *United States* v. *Lynah*, 188 U.S. 445; *Portsmouth Co.* v. *United States*, 260 U.S. 327; *Pumpelly* v. *Green Bay Company*, 13 Wall. 166; *Southern Pac. R. Co.* v. *San Francisco Sav. Union*, 146 Cal. 290, 79 Pac. 961; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1; *United States* v. *2979.72 Acres of Land, Etc.*, 235 F.2d 327 (C.A. 4); *United*

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[3] Petitioner has misread the *Kellettville* case and inserted in the passage which it quotes (Pet. 12) a parenthetical phrase contrary to what the court found, *i.e.*, that the gas mains there were *below* the maximum water level. Similarly, the water mains in the *Fix* case were within the "taking area."

States v. *Twin City Power Company*, 248 F.2d 108 (C.A. 4).

CONCLUSION

The decision below rests on the settled principle that frustration of business opportunities in consequence of a taking for public use does not give rise to a claim under the Fifth Amendment. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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